

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

JAMES WILLIAM AUSSICKER,

Petitioner,

v.

Case No. 2:08-CV-12280

CINDI CURTIN,

Respondent.

ORDER DENYING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

This matter is before the court on Petitioner's motion for summary disposition concerning his pending petition for a writ of habeas corpus. Petitioner filed his initial petition in May, 2008. Respondent filed an answer to the petition in December, 2008. That same month, Petitioner filed an amendment to his petition. Respondent did not file a response to the amendment, but submitted the state court record in April, 2009. Petitioner filed a reply brief on October 26, 2009, along with the present motion.

Federal Rule of Civil Procedure 56(c) provides that summary judgment is proper:

If the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(c). Although the parties submitted their initial pleadings last year, Respondent did not file the state court record until April, 2009 and Petitioner filed a reply brief as recently as October 26, 2009. The court has yet to review those materials in any detail. At this time, therefore, the court cannot conclude that there is no genuine issue of material fact or that Petitioner is entitled to judgment as a matter of law.

Furthermore, a default judgment is unavailable in a habeas corpus proceeding. See *Allen v. Perini*, 424 F.2d 134, 138 (6th Cir. 1970). The court will address the merits of the case in a forthcoming opinion. Accordingly,

IT IS ORDERED that Petitioner's motion for summary disposition [Dkt. # 17] is DENIED.

S/Robert H. Cleland
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

Dated: November 9, 2009

I hereby certify that a copy of the foregoing document was mailed to counsel of record on this date, November 9, 2009, by electronic and/or ordinary mail.

S/Lisa G. Wagner
Case Manager and Deputy Clerk
(313) 234-5522